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No. 87-727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL TELEPHONE COMPANY
OF CALIFORNIA, LOUISE W. BOWSER,
and RICHARD SAYRE,
Petitioners,

vs.

FLOYD RAY ADDY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT AND
SUGGESTION OF SUMMARY REVERSAL

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners respectfully submit that this Court should grant certiorari and summarily reverse the Ninth Circuit's decision herein, which overturned the district court's grant of summary judgment to Petitioners.

The Ninth Circuit's decision is directly contrary to this Court's holdings in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Chardon v. Fernandez*, 454 U.S. 6 (1981), that a limitations period on a discriminatory discharge claim begins to run when the employee is notified of the decision, not when the discharge takes effect.

In reply to Respondent's Brief in Opposition, Petitioners call the following points to the Court's attention:

1. Respondent Floyd Ray Addy ("Addy") repeatedly asserts throughout his brief that Petitioner General Telephone Company of California ("General") continued

after the March 20, 1981, notice of termination to reassure him that it was looking for alternative employment for him. This assertion is flatly contrary to the Ninth Circuit's correct observation that "*Addy admitted in his deposition that those alleged reassurances ended upon Addy's receipt of the March 20, 1981, letter.*" (App. A. at 16; emphasis added).

In fact, in his deposition Addy admitted that General's February 23, 1981, offer of alternative employment was presented as his "last chance." It was an "arm twister," meaning, "This is it. Take it or leave it." Supp. Ex., Tab AE, pp. 189-93. Respondent asserted in his deposition that General's employee relations personnel were "furious" at his failure to respond to this "last chance" offer (Vol. I, Tab CR 35, Ex. B, p. 137), and he admitted that no one thereafter told him not to worry or that he was going to have a job with the company. Supp. Ex., Tab AG, p. 199; see Vol. 2A, Tab 38, p. 848.[1]

District Court Judge Waters, in granting summary judgment to Petitioners, said from the bench, "*I think he was told clearly and indisputably that he was going to be terminated . . . at least as early as March 20th . . . .*" (App. B at 9; emphasis added). This factual finding is inescapably dispositive of the limitations issue under this Court's *Ricks* and *Chardon* decisions. The Ninth Circuit simply misunderstood and misapplied this Court's teachings.

2. Respondent contends that the limitations period was tolled for up to a year due to the EEOC's conciliation efforts. (Resp.'s Brief, p. 12). The principle of tolling during

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[1] Additionally, an ongoing job search by General on behalf of Respondent could not be squared with a frustrated supervisor's order to Respondent: "[I]f you don't get your stuff packed, I'll throw it in boxes for you." Vol. I, Tab CR 35, Ex. F., p. 157; Supp. Ex., Tab AH, pp. 202-203.

conciliation, based upon 29 U.S.C. §626(e)(2), formed no part of the Ninth Circuit's reasoning in overturning the summary judgment. This statutory tolling principle simply does not apply to private actions such as the instant case. It is well established that, "[d]uring attempts to conciliate, the statute of limitations is tolled for a period of up to one year, *but only for the EEOC, not in a private action.*" *Schlei & Grossman's Employment Discrimination Law* at 86 (BNA 1983-84 Cum. Supp.) (emphasis added).[2]

3. Respondent attempts to obscure the fact that the issue here is the application of *Ricks-Chardon* principles to an individual discharge decision by alluding to allegedly discriminatory past policies of General, and even other alleged discriminatees. Respondent argues that his discharge is therefore somehow a "continuing violation" (Resp. Brief at pp. 13-16). Again, this argument formed no part of the Ninth Circuit's reasoning, and indeed, the record is clear that there is no issue of any present discriminatory policy. Vol. I., Tab CR 35, Ex. AF, pp. 322-23. This Court long ago determined that a discrete discharge decision, such as General's decision to terminate

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[2] Respondent's citations of authority on the issue are inapposite at best. *Leite v. Kennecott Copper Corp.*, 558 F. Supp. 1170, 1173 n.1 (D. Mass.), *aff'd without opinion*, 720 F.2d 658 (1st Cir. 1983), far from supporting Respondent, explicitly holds that only in a suit by the federal government is the statute tolled for conciliation efforts. In so holding, the *Leite* court cited several other cases as well as legislative history. *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970), was essentially overruled by this Court in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and does not in any event involve the unique statutory scheme here at issue, 29 U.S.C. §626(e)(2). Finally, *Miller v. Internat'l Tel. & Tel. Corp.*, 755 F.2d 20, 24 (2d Cir.), *cert. denied*, 474 U.S. 851 (1985), a well-reasoned case extensively discussed in the Petition, recites 29 U.S.C. §626(e)(2)'s language, but does not at all purport to apply it to a private action, and indeed, does not further address it.

Respondent, is *not* a continuing violation. *United Air Lines v. Evans*, 431 U.S. 553 (1977).

4. It is important to note that Respondent omits any reference to the uncontroverted fact that he had the benefit of counsel at all times — *even before his receipt of the March 20 termination notice*. This crucial point in and of itself warrants summary reversal, since the Ninth Circuit's decision sharply conflicts with a substantial body of well-reasoned contrary authority holding that equitable relief from limitations should not be extended to plaintiffs assisted by counsel. See Petition at 18-21.

5. The various alleged factual disputes that Respondent cites as arguments against summary judgment, such as whether General had good cause to discharge Addy (Resp. Brief at 21), are totally irrelevant to the limitations issue. Even if General's termination decision was "willful" — which Respondent cites as another factual dispute (Resp. Brief at 20) — the three-year limitation for "willful" violations had run under the *Ricks-Chardon* rule.

For all of the foregoing reasons and those previously presented in the Petition, Petitioners respectfully urge this Court to grant the writ and summarily reverse the Ninth Circuit's decision.

DATED: January 11, 1988

Respectfully submitted,

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